Save in one respect, the open-air cinemas, this order is substantially what the respondents in their joint action have asked for. The judge made the order for an injunction in the full realisation of this.

The appellant holds a lease over nearly 8½ acres of land which includes a lake. The conditions of use are stated in the lease to be:

"Syarat-syarat Nyata:

Tanah yang dikeluarkan milik ini hanya boleh digunakan untuk Komplek Pelancongan (Skating ring, restaurant, drive-in-cinema), dan tidak boleh digunakan untuk lain-lain tujuan melainkan dengan mendapat kebenaran daripada Pihak Berkuasa Negeri."

In English, it means that the land which has been given the title can only be used as a tourist complex (skating rink, restaurant, drive-in cinema), and cannot be used for other purposes except with the consent of the State Authority.

Despite the clear restriction of use to a skating rink, restaurant and a drive-in cinema and the express prohibition of any other use, the appellant built an open-air stage on the lake on which a music band and sometimes two music bands operated with live singers. It also floated a junk as a discotheque, which as we understand this modern term, is a place for the reproduction of recorded music. As we have observed earlier on, it is reasonably certain that amplifiers were used, the sounds were greatly magnified and carried over a greater distance than they would, unassisted, do, from the users' point of view, to attract customers, but alas, from the neighbours' point of view, to constitute an annoyance.

Noise in urban society there inevitably will be. Anyone living in town must expect to have to put up with a certain volume of noise from his neighbours and he, in turn, must have the right to make a certain amount of noise in the enjoyment of his property. But it is just as clear that no one has the right to create a volume of noise of such intensity and no one should be asked to put up with such a volume which by any reasonable standard becomes a nuisance.

As Lawton L.J. says in *Kennaway* v. *Thompson*[1] at page 366: "Now nearly all of us living in these islands have to put up with a certain amount of annoyance from our neighbours. Those living in towns may be irritated by their neighbours' noisy radios or incompetent playing of musical instruments and they in turn may be inconvenienced by the noise created by our guests slamming car doors and chattering after a late party. Even in the country the lowing of a sick cow or the early morning crowing of a farmyard cock may interfere with sleep and comfort. Intervention by injunction is only justified when the irritating noise causes inconvenience beyond what other occupiers in the neighbourhood can be expected to bear. The neighbour who is complaining must remember, too, that the other man can use his property in a reasonable way and there must be a measure of give and take, live and let live."

The appellant's first contention that as the registered and legal owner of the land, it can use its land in any manner it pleases it to use, no matter what the effect on the neighbours may be, is unsupportable by law or reason or good sense and must be rejected outright. Except to the deaf or hard of hearing or to those to whom noise has no appreciable significance or to those to whom the noise they deliberately create means the clicking of their money tills, noise above a certain level becomes a nuisance and can be stopped by the inherent powers of the court to regulate the lives of the people.

The three respondents have put themselves on affidavit about the noise created by the appellant on the open-air stage and discotheque. They come from various walks of life. They complain that the level of the noise is intolerable. One of them had already lost a good tenant who would not have moved out of the premises but for the noise, night after night. The appellant appeared at first to have conceded that the noise level was too high and was prepared to be conciliatory. It agreed to moderate the re-production of the sounds but the respondents found no moderation or even relief.

Mr. Chin who appeared for the appellant both in the High Court and before us submitted that the test was whether the noise was excessive. He would appear to have based his contention that it was not because of the distance separating the respondents' houses from the sources of noise. But he made no concession to the amplification of the noise by electronic means, a process to which there appears to have no limitation and which would make nonsense of the distance of between 100 and 200 yards that lay between the houses and the sources. The learned judge accepted the evidence as establishing that the noise is intolerable and was an actionable nuisance.

We agree and we dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Chin & Co.; Chong Kok Hon & Co.*

MALAYAN BANKING BHD. v. FOO SEE MOI

[F.C. (Chang Min Tat, Salleh Abas & Abdul Hamid F.JJ.) January 12 & February 16, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 135 of 1979]

Banking — Overdraft account — Judgment obtained for sum owing and interest — Compound interest — Application for execution more than six years after judgment — Whether leave should be granted.

Evidence — Letters written without prejudice — Agreement arrived at — Admissibility.

Practice and Procedure — Application for execution more than six years after judgment — Whether leave should be granted — R.S.C. 1957, O. 42 r. 23.

The appellant had obtained final judgment in default of defence against the respondent for the sum of $674,539.53 with interest. There was subsequent correspondence between the parties and it was agreed *inter alia* that the respondent should pay $850,000 in full settlement, out of which $700,000 was to paid forthwith and the balance by instalments. The sum of $800,000 was paid, leaving a balance of $50,000 outstanding. The respondent asked for time to pay and it was not till May 10, 1978 that the appellant rescinded the agreement and demanded payment of the balance and interest which stood at $187,401.10. As more than six years had elapsed from the judgment the appellant applied for leave to levy execution. The application was dismissed in the High Court and the appellant appealed.

Held, allowing the appeal: (1) on the facts the learned judge could not have judicially exercised his discretion to dismiss the application;

(2) payment of compound interest on an overdrawn account was a usual and perfectly legitimate mode of dealing between banker and customer and this fact was irrelevant as a ground for the refusal of the leave sought.

Cases referred to:-

(1) *Tio Chee Hing* v. *Chung Khiaw Bank* [1981] 1 M.L.J. 227.

(2) *Yourell* v. *Hibernian Bank* [1918] A.C. 372.

FEDERAL COURT.

H.Y. Too for the appellant.

N.A. Marjoribanks for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): In this action the plaintiff Bank issued out a writ for money owing to it by the defendant on three over-draft accounts and interest. On July 17, 1970 the Bank signed final judgment in default of defence. It is never suggested that the defendant had any defence to the claim and perhaps for this reason, he did not bother to defend. The judgment was for the sum of $674,539.53 with interest thereon at the agreed rate of 10.8% p.a. with monthly rests from January 1, 1970 to date of judgment and thereafter at 6% p.a. on the decretal sum to date of payment and costs.

Next, so far as the court is concerned, the Bank on December 30, 1978 applied for leave, as required by Order 42 rule 23, Rules of the High Court, 1957 (now Order 46 rule 2(1)(a) Rules of the High Court, 1980), to levy execution, since 6 years had elapsed from the judgment. It did not do so *ex parte* as it was entitled to do, though of course the court had at all times the power to order service on the defendant. To that *inter partes* summons, the defendant filed an affidavit in reply.

The matter came up before a Judge of the High Court on May 31, 1979. It was heard in open court and decided promptly enough. After hearing argument, he dismissed the application for leave and gave leave to appeal. Notice of appeal was filed, within time.

The solicitors for the Bank applied, in the usual manner, for the notes of the argument taken by the judge and the grounds of his decision, but after waiting for a reasonable time and finally despairing of ever getting both, filed an appeal record without them. That was on November 4, 1980, that is, more than 17 months after the hearing. Neither counsel filed or submitted his own note of the proceedings which, in the absence of the judge's own notes, would, if agreed between the parties, be of some assistance to us on appeal. But, fortunately, two days or so before the appeal was brought on for hearing on January 12, 1981, a copy of the judge's notes of the argument was made available. It consisted of only 2½ pages of double-spaced typescript. But no grounds of decision. So we still do not know the reasons for the dismissal of the Bank's application for leave.

It becomes necessary therefore for us at the appeal to note the various submissions made in the High Court and to consider their validity. But first, some of the pertinent and relevant facts.

Briefly, it was the first contention of the defendant that the judgment-debt had been fully settled by the Bank agreeing to accept a sum of $750,000 which he had paid. That had been described by the Bank as a blatant lie. This is but one instance where the affidavits conflict, but the truth can be gathered from the contemporaneous correspondence that passed between the parties through their solicitors.

Quite clearly, after failing to defend the claim and having considerable properties against which the judgment could be executed, and especially in view of the fact that he was at that time bound contractually to sell these properties which formed part of a housing estate developed by him, the defendant had to prevent the execution. The best way would, of course, be to pay off the judgment-debt but lacking the liquidity, another way would be to enter into negotiations with the Bank for time to make the payment and for the payment to be made by instalments. The negotiations were put down in several letters, all, prudently, expressed to be without prejudice.

It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

An objection was taken in the High Court to the admissibility of these letters. How the judge regarded this submission we do not know. But before us, this objection to the admissibility of the correspondence was not pursued. If that is a tacit concession that it led to an agreement between the parties and it contained the terms of this agreement, counsel at the appeal is right, as the following letters show.

On July 21, 1975, the then solicitors for the defendant wrote the following letters to the Bank:

"MAH-KOK & DIN

Kuala Lumpur: July 21, 1975.
URGENT BY HAND
WITHOUT PREJUDICE
Attn: Mr. Too

THY/8108-48/MBB/FSM
OSS/3241/FSM/98

Tuan-tuan,

Re: *Kota Bahru High Court Application for Execution No. 3 of 1975*

We refer to your letter dated July 18, 1975 contents of which are noted.

2. As a final attempt to reach an amicable settlement our client is prepared to make the following proposals:—

(i) Sum in full and final settlement agreed at $850,000.00.

(ii) A sum of $700,000.00 to be paid to your clients forthwith.

(iii) Upon payment of the said sum of $700,000.00 your clients to discharge all the securities except the lots belonging to our client namely: Lots 187 and 188 Kota Bharu and Lots 235, 236, 237, 238 and 239 Kuala Krai.

(iv) The balance sum of $150,000.00 to be paid on or before 30.9.75 and upon such payment the remaining lots to be discharged.

(v) Costs in the sum of $10,000.00 to be paid by our client.

3. We believe the above offer should be acceptable to your clients because it is in line with the terms set out by your clients vide your letter dated July 7, 1975.

4. Kindly let us hear from you as soon as possible.

Yang benar,
Sd. ?

M/s. Shook Lin & Bok,
Lee Wah Bank Building,
KUALA LUMPUR.

c.c. Client."

It clearly contained certain proposals.

In a reply, stated also to be without prejudice, the Bank made the following counter-proposals:

"OSS/3241/FSM/98
THY/8108-48/MBB/FSM
July 28, 1975.
Attn: Mr. Ong See Seng

URGENT
BY HAND
WITHOUT PREJUDICE

Dear Sirs,

Re: *Kota Bahru High Court Application for Execution No. 3 of 1975*

We refer to the above matter and the conference at our office on July 26, 1975 between your Mr. Ong and the writer hereof.

2. We are to confirm that the following terms of settlement have been agreed upon between the parties:—

(a) Your clients will pay to our clients an initial sum of $700,000/- and a further sum of $15,000/- being the agreed costs, both sums to be paid on or before July 30, 1975.

(b) Upon receipt of the abovementioned sums, our clients shall execute a discharge of all the securities presently held by them with the exception of the following lots, namely:—

Grant No.	*Lot No.*	*Mukim*	*District*
9923	187	Town of Kota Bahru	Kota Bahru
9924	188	— do —	— do —
3095	235	Town of Kuala Krai	Ulu Kelantan
3096	236	— do —	— do —
3097	237	— do —	— do —
3098	238	— do —	— do —
3099	239	— do —	— do —

(c) Your clients shall pay the balance sum of $150,000/- to our clients on or before September 30, 1975.

(d) In default of sub-paragraph (c) abovementioned our clients shall treat the above terms of settlement as null and void. The balance of the whole judgment sum (i.e. the judgment sum dated July 17, 1970 together with all interests calculated to the date of full payment and/or realisation and costs less the sums (if any) paid in shall immediately fall due and payable by your clients.

(e) Upon receipt of the balance sum of $150,000/- from your clients on or before September 30, 1975 our clients shall execute a discharge of the remaining securities held by them.

(f) Your clients shall in addition to (a) and (c) above stated, pay for all legal costs relating to the preparation, execution and registration of all the respective Discharge of Charges.

(g) Notwithstanding the abovementioned terms of settlement, it is hereby understood by all parties concerned that should your clients fail to comply with sub-paragraph (a) hereof, our clients shall be entitled forthwith to execute for the full judgment sum due under the Order of Court dated July 17, 1970 together with all interests calculated to the date of full payment and or realisation and costs.

Yours faithfully,
Sd. ?

Messrs. Mah Kok & Din,
Advocates & Solicitors,
Penthouse,
9, Jalan Gereja,
Kuala Lumpur.

c.c. Malayan Banking Berhad,
92, Jalan Bandar,
Kuala Lumpur.
(Attn: Mr. Teh Soon Poh)"

The main proposal by the defendant for payment of $850,000 by way of full settlement was therefore acceptable though the amount due at that time had increased to $961,175.25 but other terms as to costs and the result of delay or default were added.

The next relevant letter is the following from the defendant to the Bank:

"MAH-KOK & DIN

Kuala Lumpur: November 26, 1975.

BY HAND
Attention: Mr. Too

THY/8108-48/MBB/FSM
OSS/3241/FSM

Tuan-tuan,

Re: *Kota Bahru High Court Application for Execution No. 3 of 1975*

We refer to your letter dated November 18, 1975.

2. As indicated in our previous letters upon the approach made by some of the purchasers to the Chinese Chamber of Commerce Kota Bharu, a sub-committee was formed to mediate in this matter. Our client accordingly agreed to abide by the recommendations of the sub-committee. The terms for amicable settlement were reached and agreed to by the purchasers. Based on this agreement our client made the proposal to pay the $850,000.00 as previously agreed and he has so far paid $800,000.

3. However at this moment, several of the purchasers have gone back on their promise to comply with the agreement reached as a result of which our client had been unable to collect the $50,000.00 still due to your clients.

4. However as our client had given an undertaking to the sub-committee not to do anything to prejudice an amicable settlement of this matter, the sub-committee has arranged for another meeting on November 27, 1975 with the recalcitrant purchasers to settle the issue of payment to our clients. According to the agreement a further sum in excess of $50,000.00 is due to our client from these purchasers.

5. In the circumstances our client appeals to your clients to bear with him until he hears from the sub-committee of the result of the meeting on November 27, 1975. Our client has every intention to raise the $50,000.00 and it is only a question of allowing him a little bit of time to do so having regard to the circumstances stated above.

Yang benar,
Sd.

M/s. Shook Lin & Bok,
Lee Wah Bank Building,
KUALA LUMPUR.

c.c. Client."

This letter has not been expressed to be without prejudice. It could only be a deliberate omission and

for a good reason. An agreement had been reached, and it was on the terms of the Bank's counter-proposals.

It is to be noted that of the $850,000 agreed to be paid in two instalments, $800,000 had been paid. The balance of $50,000 which was to be paid in the second instalment remained outstanding. The defendant needed time, time to gather the money from the purchasers of his lands and the houses to be built thereon. He had hoped to get this money before the 2nd instalment of $150,000 became due but he had met with some delay and had encountered certain difficulties, as can be gathered from the several actions taken against him by these purchasers. Therefore he wrote on January 29, 1976 the following letter to the Bank:

"MAH-KOK & DIN

Kuala Lumpur: January 29, 1976.
BY HAND
Attention: Mr. Too

THY/8108-48/MBB/FSM
OSS/3241/FSM

Tuan-tuan,

Re: *Kota Bahru High Court Application for Execution No. 3 of 1975*

We refer to your letter dated January 22, 1976.

2. Our clients are disappointed that your clients are pressing for the payment of $50,000.00 in spite of the explanation given for the delay. In any event our clients will try to raise the money after the Chinese New Year and we look forward to your withholding further action in the meantime.

Yang benar,
Sd. ?

M/s. Shook Lin & Bok,
Bangunan Lee Wah Bank,
Medan Pasar,
KUALA LUMPUR.

c.c. Dato Foo See Moi."

At this request, and very possibly on other occasions as well, the Bank gave him time, instead of rescinding the agreement under paragraph (c) of the letter of July 28, 1975, *supra.* It was not until May 10, 1978, that the Bank rescinded the agreement and demanded, as it contractually could do, the payment of the balance of the decretal sum then outstanding together with interest in accordance with the terms of the judgment. As at December 31, 1977, this balance stood at $187,401.10. It was rather more when the application for leave was heard. It is even more now, since interest at the court rate of 6% has been accumulating.

From the notes of the submission, objection appears to have been taken to the delay in the proceedings occasioned by the Bank. It seems to have been stressed with a certain didactism that delay defeats equity and that a court in the exercise of its equitable discretion will not forgive laches. But clearly, if there had been any delay in rescinding the agreement and in levying execution for the balance of the judgment-sum, it had been occasioned only by the grace asked for by the defendant and given to him at his request by the Bank. In *Tio Chee Hing* v. *Chung Khiaw Bank,*[1] this court had not the slightest hesitation in similar circumstances in upholding the decision of the High Court to grant leave. In our view, the High Court in that case had properly exercised the discretion vested in it. Indeed, this court was unable to see how the High Court could have acted otherwise.

If in the present case, in such similar circumstances, the High Court had dismissed the application for leave merely on the grounds of delay and laches, it would have, in our respectful view, exercised its discretion wrongly.

On the interest due on the debt, the defendant's then counsel contended, first, that the balance of the decretal sum represented only interest since the decretal sum of $674,539.53 had been paid by the $800,000 received by the Bank from him or paid on his account and, secondly, that by reason of section 6(3) of the Limitation Ordinance, 1953, no arrears of interest in respect of any judgment-debt shall be recovered after the expiration of six years from the rate on which the interest became due.

There is a statement of account prepared by the Bank which showed that the total of the overdraft accounts stood at $674,539.53 as at January 1, 1970, that interest at 10.8% p.a., presumably the agreed rate, accrued with monthly rests, the whole amount increased to $715,636.77 on July 18, 1970 when judgment was entered, thereafter interest at the judgment rate of 6% p.a. was added with yearly rests, and taking into account the payment of $700,000 on July 30, 1975 and $100,000 on October 22, 1975, the balance of the decretal sum due on December 31, 1977 was $187,401.10. It is beyond argument that in arriving at the balance, the Bank had adhered strictly to the terms of the judgment.

No submission was made at the appeal before us on the propriety of the interest, but if the submission made in the High Court had any influence on the decision, then it is clearly irrelevant as a ground for the refusal of the leave sought. In *Yourell* v. *Hibernian Bank,*[2] Lord Atkinson described the practice of bankers in debiting interest to an overdrawn current account periodically and thereby increasing the capital sum, which is the effect of the provision for periodical "rests", as "a usual and perfectly legitimate mode of dealing between banker and customer", though it meant securing for the bank the benefit of compound interest. *Paget* on Banking (8th Edn.) at page 133 justifies it thus:

"There is no common law right to charge even simple interest on an overdraft but the claim could be supported on the ground of universal custom of bankers or on the basis of implied agreement. Where the customer has acquiesced in the system under which the interest is charged, that also would justify the claim. Such acquiescence will justify the charging compound interest or interest with periodical rests, so long as the relation of banker and customer exists, and the relationship is not changed into that of mortgagee and mortgagor. The taking of a mortgage or a charge by way of legal mortgage to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to preclude compound interest."

Insofar as limitation is concerned, we agree with the view expressed by counsel for the respondent that this is not a matter before us at the appeal. We are also of the opinion that unless limitation applies in

respect of the whole sum remaining due, for instance, after the expiry of 12 years from the date on which the judgment became enforceable and in the absence of any consideration disentitling the judgment creditor to leave, the parties should be left to themselves to work out the proper amount due in respect of which execution could be levied.

We are consequently unable to see how on the submission made to him and, presumably considered by him, the judge could have judicially exercised his discretion in the circumstances of the case to dismiss the application for leave. We therefore allow the appeal with costs here and in the court below.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Lovelace & Hastings.*

YOONG LEOK KEE CORPORATION SDN. BHD. v. CHIN THONG THAI

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 13 & February 16, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1980]

Torts — Negligence — Damages — Duty to mitigate damages — Injured person leaving hospital against medical advice — Loss of future earnings.

Damages — Duty to mitigate — Injured person leaving hospital against medical advice.

Practice and Procedure — Amendment to statement of claim after close of case for both sides — Discretion of trial judge — R.H.C. 1980, O. 20 r. 5.

The respondent was awarded damages for injuries sustained by him in the course of loading logs on to a conveyor belt upon a finding of negligence on the part of the employers. A sum of $42,000 was awarded for future loss of earnings. The appellant appealed on two grounds alleging that the learned trial judge erred (a) in allowing an amendment to be made to the statement of claim after the respondent had closed his case and after the appellant had closed his case and made the submission and (b) in his award of future loss of earnings to the respondent against the weight of the medical reports and in particular the learned judge's failure to consider the duty placed upon the respondent to mitigate the damage. It appeared on the facts that the respondent left the hospital against medical advice.

Held: (1) the learned judge had properly exercised his discretion under Order 20 rule 5 of the Rules of the High Court, 1980 when he allowed the amendment to the statement of claim in the interest of justice;

(2) it was erroneous to assess the loss of future earnings without considering the duty of the respondent to mitigate the damage. The error was one of principle and it was therefore open for the appellate court to interfere;

(3) in the circumstances the award for loss of future earnings should be reduced to $21,000.

Case referred to:-

(1) *British Westinghouse Electric and Manufacturing Company Limited* v. *Underground Electric Railways of London Limited* [1912] A.C. 673, 689.

HIGH COURT.

Dato Wong Cheng Chow for the plaintiff.

David Alfred for the respondent.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiff sued the defendants for damages arising out of an accident in a sawmill. In his statement of claim the plaintiff alleged that he was an employee of the defendants and that in the course of his work he was following a cart from which logs were thrown on the conveyor belt. He was following the cart when a log so thrown caught his right foot when the cart moved and he was dragged for five or six feet whereby he suffered severe injuries to his right foot. He alleged that the accident was caused as a result of the negligence of the defendants for not taking reasonable care to provide or maintain a safe and proper system of work and/or effective supervision.

In their statement of defence the defendants denied that the injury was caused by their negligence and stated that it was caused solely or contributed to by the plaintiff's own negligence.

In his evidence the plaintiff said that on the day in question he was working with two others in the sawmill. He was on a cart loaded with logs and was working with another person. The third person was nearer the electric saw and this person controlled the movement of the cart as well as the electric saw. The plaintiff said that while he was working on the cart that day the electric saw and the cart stopped. He noticed that a piece of cut wood was not in its alignment in the cart and as he was putting the wood in its proper place the person who was controlling the electric saw and the cart suddenly switched on the movement of the saw and the cart and as a result he lost his balance and his leg fell into a gap and he was dragged a few feet. He said that there were no safety rails on which he could hold on. After this accident the sawmill did not use this cart any more. It was bought by the defendants as a second-hand cart and had been in use for about two weeks before the accident. Someone in the factory had briefed them on the use of the cart but there were no proper instructions. He said that when he was putting the plank in its proper place the person controlling the machine was not facing him but was facing the other way towards the electric saw.

In cross-examination the plaintiff said that the cart was propelled by an electric motor and was controlled by the person who was controlling the electric saw. The cart moved backwards and forwards during the work and the mode of operation in a newer cart was also the same except that in the newer cart the man controlling the cart would face the man who worked on the car. He reiterated that there was no place on the cart for him to catch hold of when he lost his balance at the sudden movement of the cart. He was using both his hands to place the log in its proper place. He denied that the accident occurred because of his own negligence.

The second witness for the plaintiff (PW2) more or less corroborated the evidence of the plaintiff. He himself was on the ground while the plaintiff was on the cart and the plaintiff tried to adjust two timber logs which were out of alignment. The cart was then stationary and when the plaintiff was adjusting the logs the cart moved and the plaintiff fell off. PW2 then shouted out to the third man Cheong Fatt who was operating the machinery but by that time the plaintiff had moved 4—5 feet. He said that the person who operated the machinery was facing the saw